IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

THURSDAY, THE TWENTY EIGHTH DAY OF OCTOBER
TWO THOUSAND AND FOUR

PRESENT

THE HON'BLE MR JUSTICE A.GOPAL REDDY

WRIT PETITION NO : 12569 of 2004

Between:

M/s Brilliant Securities Limited, 6-2-1012, TGV Mansion, Khairtabad,
Hyderabad- 500 004 rep. by its Executive Director, Mr. C. Sudhir Babu.

..... PETITIONER

AND

M/s National Stock Exchange of India Limited, Regd. Office, "Exchange Plaza",
Bandra Kurla Complex, Bandra (E), Mumbai - 400 051,
rep. by its Manager, Arbitration Department..

.....RESPONDENT

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court will be pleased to issue a Writ of Mandamus or any other appropriate writ or order of direction declaring the notice issued by the Respondent in A.M.No. 040/96 dated 29-6-2004 as illegal, arbitrary without jurisdiction and contrary to Section 36 of the Arbitration and Conciliation Act 1996 in view of the pendency of the petition filed under Section 35 of the Arbitration and Conciliation Act 1996 by the Petitioner in O.P.No. 714 of 2001 before the II Additional Chief Judge, City Civil Court, Hyderabad and consequently restrain the Respondent from taking any steps to enforce the Award passed in A.M.No. 40 of 1996 dated 7-4-1997 till the disposal of the O.P.

For the Petitioner: MR.P.SRINIVASA REDDY, Advocate

For the Respondent.: Sri V. Padmanabham, Standing Counsel

The Court made the following :

THE HONOURABLE SRI JUSTICE

A.GOPAL REDDY

W.P.No. 12569/2004

ORDER:

By means of this writ petition filed under Art.226 of the Constitution, the petitioner-company challenges the notice issued by the respondent-National Stock Exchange India Limited in A.M.No.040/96 dt. 29-6-2004, whereunder the petitioner was called upon to deposit an amount of Rs.10,40,788-19 along with interest @ 24% per annum from 18-12-1996 till the date of payment, failing which the respondent shall be constrained to debit the award amount from the security deposit or any other monies standing to the petitioner's credit with the Exchange/Clearing Corporation without any further notice in accordance with the SEBI Circular No.SMDRP/POLICY/cir.22/99 DT. 9-7-1999, as illegal, arbitrary and contrary to Sec. 36 of the Arbitration and Conciliation Act, 1996.

The brief facts giving rise to issuance of impugned notice are as under: The petitioner is a public limited company, carrying business of stock broking through the respondent, which is a Stock Exchange duly recognized by the Central Government under Section 4 of the Securities Contracts (Regulation) Act. 1956 (for short "SCRA"). Its objects are to facilitate, assist, regulate and manage, in public interest, the dealings in securities of all kinds, to provide specialized, advanced, automated and modern facilities for trading, clearing and settlement of securities with high standard of integrity and honor and to ensure trading in a transparent, fair and open manner. In its business transaction, one of its customers, namely, M/s. Tenbaggers Cap Mark Services, Secunderabad (hereinafter referred to as "claimant"), dealing with the shares transaction with the petitioner raised a dispute with the

petitioner for payment of Rs.10,40,788-91. The said dispute was referred to arbitration through respondent. The sole arbitrator passed an award for the said amount with interest at 24% per annum by award dt. 7-4-1997. For due execution of the award, claimant filed EP No. 13/97 before the Court of Chief Judge, City Civil Court, Hyderabad against the security deposit of the petitioner lying with the respondent. Whereas the petitioner filed OP(SR) No.7653/1997 for setting aside the award passed by the Sole Arbitrator before the I Additional Chief Judge, City Civil Court, Hyderabad, which was returned with some objection. But on resubmission by order dt. 20-7-2004 returned the OP on the ground that the court has no jurisdiction to entertain the OP as arbitration proceedings are decided at Mumbai. Aggrieved by the same, the petitioner filed CMA No.1531/1997 before this court. This court allowed the appeal and permitted the petitioner to represent OP and accordingly the same was represented and numbered as OP No.714/2001, in which notice was ordered to the respondents. While so, through the impugned notice, the petitioner was called upon to deposit the award amount. The legality of which is the subject matter of challenge in the present writ petition filed contending that in view of pendency of OP lNo.714/2001 award cannot be given effect to as per Section 36 of Arbitration and Conciliation Act, 1996 (for short “the Arbitration Act,1996”). When the EP filed by the claimant itself cannot be proceeded with, issuance of impugned notice by the respondent provisionally debiting the petitioner’s account will amount to circumvent the statutory protection contained in Section 36 of the Arbitration Act, 1996. The circular under which present notice has been issued will be prospective cannot be made applicable for the awards passed earlier to the said circular.

The respondent filed an elaborate counter opposing the claim of the petitioner by contending that the impugned notice dt. 29-6-2004 was issued in exercise of powers under Bye-law 13-A and 13-B of Chapter XI of Bye-laws of the respondent-Exchange pertaining to arbitration and SEBI directives dt. 9-7-1999 regarding implementation of arbitration awards. The petitioner being a trading member of the respondent has executed an agreement in favour of the respondent undertaking inter alia to be bound by the Bye-laws, rules and regulations of the respondent and to comply with the directives issued. The arbitration mechanism provided by the respondent is pursuant to Sec. 9 (n) of SCRA, therefore the same is statutory in nature. The act of debiting and making subsequent payment is pursuant to the provisions of Byelaw 13-A and 13-B of Chapter XI of the Bye-laws, the same is saved under Section 2(4) of the Arbitration Act, 1996 and independent of Sec. 36 of the Arbitration Act, 1996. The petitioner having executed an undertaking inter alia to be bound by the Byelaws cannot file the present writ petition. The respondent is empowered to debit the deposits of the member with the amount of the award and keep it in a separate account till

disposal of the appeal filed by the petitioner challenging the award and make payment subsequently in accordance with the orders of the court. The respondent till date has not received summons from the court in the said OP. Debiting of the award amount is pursuant to the provisions of statutory arbitration, which is saved under Section 2(4) of the Arbitration Act, 1996. In view of the same, circumventing Sec. 36 of the Arbitration Act, 1996 does not arise. Deemed stay of the operation of the award under Section 36 till the appeal filed is decided is not applicable to the transaction involved in the present case. Circular dt. 9-7-1999 was the subject matter of challenge in the High Court of Judicature, Mumbai and the validity of which was upheld holding that the circular issued by SEBI is confined to members/brokers of the stock exchanges and there is no question of the circular being contrary to the provisions of Sec.36 or any other provisions of the Act and there is no illegality or arbitrariness in issuing the circular.

A reply affidavit has been filed contending that Section 9 of the SCRA enables the recognized Stock Exchanges to make Bye-laws including matters relating to arbitration. But however, the said Bye-laws cannot have any statutory flavor. Even if the Bye-law is valid, the amendment which has come into force with effect from 27-7-2002 is not applicable to the awards passed prior to the said circular and bye-laws cannot prevail over Sec. 36 of the Arbitration Act, 1996.

It was argued by the learned counsel for the petitioner that Section 9 of SCRA enables the recognized Stock Exchanges to make Bye-laws including the matters relating to arbitration. Any such Bye-law can at best have the status of an Articles of Association, they are neither statutory in character nor they have statutory flavour so as to be raised to the status of law, the same cannot prevail over Sec. 36 of the Arbitration Act,1996. Even if the Bye-law assuming to be valid, the impugned amendment which came into force with effect from 27-7-2002 is not applicable to awards passed prior to the amendment of the Bye-law. What is saved is other enactments and rules made thereunder providing for arbitration to the extent of inconsistency to the provisions of the Arbitration Act,1996 but same cannot be extended to the Bye-laws, regulations etc., In view of the above, calling the petitioner to deposit the award amount is to deny the benefit under Section 36 of the Arbitration Act,1996 which cannot be enforceable until appeal is decided. In support of his submission, he placed reliance on the judgment of the Supreme Court in ***B.K. GARAD V. NASIK MERCHANTS CO-OP. BANK LIMITED.***

Per contra, learned counsel for the respondent would contend that in exercise of powers

under section 9(n) SCRA Bye-laws of the Exchange are framed and they will prevail over the provisions of the Arbitration Act,1996. As per Bye-laws 13-A and 13-B of Chapter-XI once the award is passed against the trading member in favour of a constituent, the respondent may debit the deposits and other monies of the member lying with the respondent together with interest payable if any and keep the said amount in a separate account. The said amount will be paid to the constituent after confirmation that the no appeal has been filed challenging the award or in the event appeal filed, payment will be made according to the outcome of the appeal. The Bye-laws are framed in the interest of the general public and they cannot be termed as arbitrary or illegal. The petitioner being a trading member is governed by the Bye-laws of the Exchange. He further contends that debiting the award amount from the deposits will not amount to enforcing the award during the pendency of the appeal under Section 34 of the Arbitration Act, 1996, which will be subject to the outcome of the appeal and the respondent till date has not received summons from the court for production of records in the appeal said to have been filed by the petitioner. In view of the same respondent is justified in issuing the impugned notice. In support of his submissions, he placed reliance on the following judgments:

1. ***STOCK EXCHANGE, MUMBAI V. VINAY BUBNA***

2. ***BOMBAY STOCK EXCHANGE V. JAYA I.SHAH***

The entire controversy between the parties revolves on the interpretation of the provisions of Section 2(4) of the Arbitration Act,1994 which reads as under:

> "2 (4) This Part except sub-section (1) of section 40, sections 41 and 43 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except insofar as the provisions of this Part are inconsistent with that other enactment or with any rules made thereunder."

In view of the above provision, the question that falls for consideration is whether the Bye-laws 13-A and 13-B fall under any other enactment, which is consistent with the provisions of Sec.36 of Arbitration Act,1996.

To resolve the controversy certain relevant provisions of SCRA have to be noticed:

"SECTION 9: Power of recognized stock exchanges to make bye-laws

(1) Any recognized stock exchange may, subject to the previous approval of the Securities and Exchange Board of India, make bye-laws for the regulation and control of contracts.

(2) In particular, and without prejudice to the generality of the foregoing power, such bye-laws may provide for :

(n) the method an procedure for the settlement of claims or disputes, including settlement by arbitration;

In Circular dt. 9-7-1999 issued by the Securities and Exchange Board of India for implementation of awards, it was proposed as follows:

"The Stock Exchange should on receipt of the arbitration award, debit the amount of the arbitration award from the security deposit or any other monies of the member (against whom an award has been passed) and keep the amount in a separate account. Thereafter, a confirmation may be obtained from the concerned member that he has not filed any appeal within the stipulated time under Section 34 of the Arbitration and Conciliation Act and only then the payment may be made to the awardee. Ifl an appeal is filed and the same is pending in a court of law, the amount so kept in the separate account be paid to the awardee in accordance with the court orders."

Infurtherance to the said object, byelaws have been amended which read as under:

"13A. Notwithstanding anything contained in the Byelaws, in cases where the arbitration award is passed against the Trading Member and/or its sub-brokers and in favour of a Constituent, the Exchange may debit from the deposits or other monies of the Trading Member lying with the Exchange, the amount of award payable to the awardee together with interest payable, if any, till the date of debt after setting off the counter claim of the Trading Member and/or its sub-brokers allowed under the award, if any, and keep aside the said amount in a separate account to be dealt with in such manner as mentioned in Byelaw 13B below:

Provided however, where the award is for the delivery of securities, the Exchange may consider the closing price of such securities on the Exchange as on the date of the award or such other date the relevant authority may specify to be reasonable, stating reasons for arriving at the value of such securities and award amount.

(13B) The Exchange may make the payment of the said amount so kept aside in a separate account, to the awardee only after a confirmation was obtained

from the member to the effect that no appeal has been filed by him and whereas if the award is set aside partially or fully, then the Exchange may reverse the debit to that extent and restore the same to the credit of the Trading Member and make the payment of the reduced award amount to the awardee.

In the case of ***B.K.GARAD*** (1 supra), where legislative mandate under Section 73-B of Maharashtra Co-operative Societies Act, 1961 and the Byelaws made by the Co-operative Societies fell for consideration which provides that two seats shall be reserved on the committee of such society or class of societies as the State Government may by general or special order direct for one for the members who belong to the SCs or STs and one for the weaker section. Section further provides that if no such persons are elected or appointed, the Committee shall co-opt the required number of members on the committee from amongst the persons entitled to such representation, but the elections which were held was challenged under the Maharashtra Co-operative Societies Act, 1961 before the Additional Commissioner and the same was set-aside directing to hold elections de novo. On challenge, Mumbai High Court granted writ holding that it is not imperative that the reserved seats shall be filled in only by-election and the mandate of Sec.73-B would be adequately complied with if reserved seats are filled in by co-option. On further appeal, the Supreme Court after considering the legislative mandate in enacting Sec. 73-B reserving two seats in favour of SC/ST and weaker section to the committee held that Rule 61 of Maharastra Specified Co-operative Societies Elections to Committees (Amendment) Rules,1979 has a status of subsidiary legislation or delegated legislation. If there is any conflict between them, statute will prevail over subordinate legislation and the Bye-law if not in conformity with the statute in order to give effect to the statutory provision the rule or bye-law has to be ignored.

The case of ***STOCK EXCHANGE, MUMBAI*** (2 supra) is a case directly dealing with the issue on hand, wherein a Division Bench of Mumbai High Court while dealing with interpretation of Sec.2(4) and 10 of the Arbitration Act,1996 which provides number of arbitrators provided such number shall not be an even number as also Bye-law 249(a), which relate to constitution of Arbitral Tribunal and referring the matter to arbitration of two arbitrators one to be appointed by each party, held that since Bye-law 249(a) of the Exchange is a statutory bye-law of the Exchange having the force of enactment within the meaning of sub-Section 4 of Section 2 of Arbitration Act, 1996 and is inconsistent with the provisions of Section 10 of the Arbitration Act, 1996. In so far as number of arbitrators is concerned, bye-law would prevail excluding the application of Section 10 of the Arbitration Act, 1996.

In the case of ***BOMBAY STOCK EXCHANGE*** (3 supra), the Supreme Court while considering Sec.9 of the SCRA, and Stock Exchange Rules, Bye-laws and Regulations held that rules, bye-laws and regulations made by the Exchange though not made under a statute but having regard to the scheme as also the purport and object thereof have a statutory flavour and bye-laws are required to be made for regulation and control of contracts.

In the light of the above decisions, now we will examine whether Section 36 of the Arbitration Act, 1996 prohibits enforcement of the awards where an appeal under Section 34 is pending. What all Sec. 36 of the Arbitration Act contemplates is that where time prescribed under Section 34 to set aside the arbitral award has expired and no application is made therefrom or if it is made, it has been refused, then the award would become enforceable as a decree under the provisions of the Code of Civil Procedure. In the absence of any embargo in enforcing the award pending appeal, the submission that the said Bye-laws are inconsistent with the provisions of Section 36 of the Arbitration Act, 1996 cannot be countenanced and no such inconsistency of the Bye-laws with regard to provisions of SCRA have been pointed out by the learned counsel.

It was next argued that Bye-laws will not have any retrospective in operation but will apply prospectively to the awards made after coming into force of the Bye-laws. It is well settled now that subordinate legislation, namely, administrative instructions, circulars, orders, bye-laws, if any, will come into force on publication of notification. In my considered view, the challenge either to the regulations or to the bye-laws is without any substance. The circular has been issued by the SEBI Board in exercise of powers under Section 11 and 11 B of the Securities and Exchange Board of India Act, 1992 in order to protect interest of the investors. It has been brought to the notice of the SEBI Board that arbitration awards passed in favour of the clients/investors are not implemented and the stock exchanges are unable to take appropriate action in order to ensure implementation of the awards. Further in implementation of awards, Bye-laws 13-A and 13-B of Chapter XI of the Bye-laws of the respondent-Exchange governing arbitration have been amended. The Bye-laws so amended apply to the cases where arbitration award is passed against the Trading Member and/or its sub-brokers and in favour of a Constituent, which authorizes the Exchange to debit from the deposits or other monies of the Trading Member lying with the Exchange, the amount of award payable to the awardee together with interest and the same will be paid as per Bye-law 13B, namely, if no appeal has been filed and whereas if the award is set-aside partially or fully, the Exchange may reverse the debit to that extent

and restore the same to the credit of the Trading Member and the reduced award amount to the awardee. In view of coming into force of the Bye-laws, the respondent-Exchange is under obligation to see that investors protection has to be safeguarded, therefore it applies to all awards which are unimplemented. It is well settled that matters of procedure, are, however, different and the law affecting procedure is always retrospective. But it does not mean that there is an absolute rule of inviolability of substantive rights. If the new law speaks in language, which expressly or by clear intendment, takes in even pending matters. In the absence of any vested right, prohibiting implementation of the award till the disposal of the appeal, bye-laws cannot be said to be inconsistent with the provisions of Sec. 36 of the Arbitration Act, 1996, which only provides the procedure for enforcement of awards, on attaining finality. Since appeal is pending, what prevented the petitioner from obtaining necessary orders staying implementation of the award is not forthcoming. In the absence of any stay for enforcement of the award obtained in the pending appeal, action taken by the respondent-Exchange for due implementation of the award and issuing impugned notice do not suffer from any infirmities.

The writ petition fails and it is accordingly dismissed.

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A.GOPAL REDDY,J

DT.28–10-2004

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To

1. The Manager, Arbitration Department, M/s National Stock Exchange of India Limited, Regd. Office, "Exchange Plaza",Bandra Kurla Complex, Bandra (E), Mumbai - 400 051,

2.2 CD copies